

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON

8 MICHAEL PONCE,

9 Plaintiff,

10 v.

11 NANCY A. BERRYHILL, Acting  
12 Commissioner of Social Security,

13 Defendant.

NO. C17-570-JPD

ORDER

14 Plaintiff Michael Ponce appeals the final decision of the Commissioner of the Social  
15 Security Administration (“Commissioner”) that denied his applications for Disability Insurance  
16 Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the  
17 Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an  
18 administrative law judge (“ALJ”). For the reasons set forth below, the Court AFFIRMS the  
19 Commissioner’s decision.

20 I. FACTS AND PROCEDURAL HISTORY

21 Plaintiff is a 35-year-old man with a high school diploma and one year of college  
22 education. Administrative Record (“AR”) at 237. His past work experience includes  
23 employment as a custodian, retail sales associate, and personal trainer. AR at 244. Plaintiff  
24 was last gainfully employed in March 2013. AR at 236.

1 In August 2013, Plaintiff applied for SSI and DIB, alleging an onset date of March 7,  
2 2013. AR at 202-17. Plaintiff asserts that he is disabled due to autism spectrum disorder,  
3 general anxiety disorder, depression, trochanter bursitis, neuropathy, back injury, leg injury,  
4 arthritis, and attention deficit hyperactivity disorder. AR at 236.

5 The Commissioner denied Plaintiff's applications initially and on reconsideration. AR  
6 at 147-50, 154-57. Plaintiff requested a hearing, which took place on December 3, 2014. AR  
7 at 42-90. On July 24, 2015, the ALJ issued a decision finding Plaintiff not disabled and denied  
8 benefits based on her finding that Plaintiff could perform a specific job existing in significant  
9 numbers in the national economy. AR at 18-35. Plaintiff's administrative appeal of the ALJ's  
10 decision was denied by the Appeals Council, AR at 1-4, making the ALJ's ruling the "final  
11 decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). On April 13,  
12 2017, Plaintiff timely filed the present action challenging the Commissioner's decision. Dkt.  
13 1, 3.

## 14 II. JURISDICTION

15 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§  
16 405(g) and 1383(c)(3).

## 17 III. STANDARD OF REVIEW

18 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
19 social security benefits when the ALJ's findings are based on legal error or not supported by  
20 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th  
21 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is  
22 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
23 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750  
24 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in

1 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,  
2 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a  
3 whole, it may neither reweigh the evidence nor substitute its judgment for that of the  
4 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is  
5 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that  
6 must be upheld. *Id.*

#### 7 IV. EVALUATING DISABILITY

8 As the claimant, Mr. Ponce bears the burden of proving that he is disabled within the  
9 meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th  
10 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in  
11 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is  
12 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§  
13 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if his impairments are  
14 of such severity that he is unable to do his previous work, and cannot, considering his age,  
15 education, and work experience, engage in any other substantial gainful activity existing in the  
16 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-  
17 99 (9th Cir. 1999).

18 The Commissioner has established a five step sequential evaluation process for  
19 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§  
20 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At  
21 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at  
22 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step  
23 one asks whether the claimant is presently engaged in "substantial gainful activity." 20 C.F.R.

1 §§ 404.1520(b), 416.920(b).<sup>1</sup> If he is, disability benefits are denied. If he is not, the  
2 Commissioner proceeds to step two. At step two, the claimant must establish that he has one  
3 or more medically severe impairments, or combination of impairments, that limit his physical  
4 or mental ability to do basic work activities. If the claimant does not have such impairments,  
5 he is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe  
6 impairment, the Commissioner moves to step three to determine whether the impairment meets  
7 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),  
8 416.920(d). A claimant whose impairment meets or equals one of the listings for the required  
9 twelve-month duration requirement is disabled. *Id.*

10 When the claimant's impairment neither meets nor equals one of the impairments listed  
11 in the regulations, the Commissioner must proceed to step four and evaluate the claimant's  
12 residual functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the  
13 Commissioner evaluates the physical and mental demands of the claimant's past relevant work  
14 to determine whether he can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If  
15 the claimant is able to perform his past relevant work, he is not disabled; if the opposite is true,  
16 then the burden shifts to the Commissioner at step five to show that the claimant can perform  
17 other work that exists in significant numbers in the national economy, taking into consideration  
18 the claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g),  
19 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is unable  
20 to perform other work, then the claimant is found disabled and benefits may be awarded.

---

21  
22  
23 <sup>1</sup> Substantial gainful activity is work activity that is both substantial, i.e., involves  
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §  
404.1572.

1 V. DECISION BELOW

2 On July 24, 2015, the ALJ found:

- 3 1. The claimant meets the insured status requirements of the Act through  
4 December 31, 2018.
- 5 2. The claimant has not engaged in substantial gainful activity since  
6 March 7, 2013, the alleged onset date.
- 7 3. The claimant's eating disorder, obesity, bursitis of the right hip,  
8 affective disorder, anxiety disorder and Autism Spectrum Disorder are  
9 severe impairments.
- 10 4. The claimant does not have an impairment or combination of  
11 impairments that meets or medically equals the severity of one of the  
12 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1.
- 13 5. The claimant has the RFC to perform light work as defined in 20  
14 C.F.R. §§ 404.1567(b) and 416.967(b) except: he can lift and/or carry  
15 up to 20 pounds occasionally, and 10 pounds frequently; stand or walk  
16 for approximately six hours and sit for approximately six hours per  
17 eight hour workday with normal breaks; occasionally operate foot  
18 controls; occasionally climb ramps or stairs, but never ladders, ropes  
19 or scaffolds; occasionally balance, stoop, kneel, crouch, or crawl; and  
20 must avoid concentrated exposure to extreme cold, extreme heat,  
21 excessive vibration, and workplace hazards such as dangerous  
22 machinery or working at unprotected heights. He is able to perform  
23 simple tasks consistent with unskilled work, with superficial  
24 interaction with co-workers and the public.
6. The claimant is unable to perform any past relevant work.
7. Considering the claimant's age, education, work experience, and RFC,  
there are jobs that exist in significant numbers in the national economy  
that he can perform.
8. The claimant has not been under a disability, as defined in the Act,  
from March 7, 2013, through the date of the decision.

AR at 22-35.

VI. ISSUES ON APPEAL

The principal issues on appeal are:

1. Whether the ALJ erred in discounting Plaintiff's subjective testimony; and



1 *Colvin*, 595 Fed. Appx. 696, 697-98 (9th Cir. Dec. 23, 2014) (finding that rule-out and  
2 provisional diagnoses of malingering constitute affirmative evidence of malingering that would  
3 support “a negative credibility finding, which would render any claimed error” in the  
4 remainder of the ALJ’s credibility assessment harmless).

5 Even if the ALJ was required to provide reasons to discount Plaintiff’s testimony, the  
6 ALJ’s reasons are legally sufficient. The ALJ properly considered the extent to which the  
7 objective medical evidence was inconsistent with Plaintiff’s allegations. AR at 28; *Rollins v.*  
8 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (“While subjective pain testimony cannot be  
9 rejected on the sole ground that it is not fully corroborated by objective medical evidence, the  
10 medical evidence is still a relevant factor in determining the severity of the claimant’s pain and  
11 its disabling effects.”). The ALJ likewise found Plaintiff’s allegations regarding mental  
12 symptoms to lack corroboration in the record, and to be inconsistently reported. AR at 29-31.  
13 These are clear and convincing reasons to discount Plaintiff’s testimony.

14 The ALJ also discussed the extent to which the record revealed inconsistencies  
15 regarding Plaintiff’s need for a wheelchair and a caregiver (AR at 29), and these  
16 inconsistencies undermine Plaintiff’s allegations. See *Greger v. Barnhart*, 464 F.3d 968, 972  
17 (9th Cir. 2006) (ALJ may consider a claimant’s inconsistent or non-existent reporting of  
18 symptoms); *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005) (ALJ appropriately considers  
19 inconsistencies when assessing a plaintiff’s testimony).

20 The ALJ also noted that Plaintiff did not follow medical evidence to exercise, and  
21 instead reported that he spent most of his time playing video games. AR at 29. The ALJ did  
22 not err in considering Plaintiff’s failure to comply with medical recommendations. See  
23 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008).

24 Lastly, the ALJ detailed the ways in which Plaintiff’s work history and other activities

1 contradict his alleged social limitations. AR at 30. The ALJ identified specific  
2 inconsistencies, and these support the ALJ's conclusion regarding the reliability of Plaintiff's  
3 testimony. *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (activities may undermine  
4 credibility where they (1) contradict the claimant's testimony or (2) "meet the threshold for  
5 transferable work skills").

6 The ALJ provided many clear and convincing reasons to discount Plaintiff's credibility,  
7 and the ALJ's assessment was bolstered by the affirmative evidence of malingering in the  
8 record. The ALJ's assessment of Plaintiff's testimony is affirmed.

9 B. The ALJ did not err in failing to develop the record.

10 "The ALJ in a social security case has an independent duty to fully and fairly develop  
11 the record and to assure that the claimant's interests are considered." *Tonapetyan v. Halter*,  
12 242 F.3d 1144, 1150 (9th Cir. 2001) (internal quotation marks and quoted sources omitted).  
13 That duty "exists even when the claimant is represented by counsel." *Brown v. Heckler*, 713  
14 F.2d 441, 443 (9th Cir. 1983). However, "[a]n ALJ's duty to develop the record further is  
15 triggered only when there is ambiguous evidence or when the record is inadequate to allow for  
16 proper evaluation of the evidence." *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001).

17 Plaintiff argues that the ALJ erred in failing to develop the record regarding his  
18 borderline personality disorder. Dkt. 14 at 23. Plaintiff does not identify any ambiguous  
19 evidence or an inadequacy of evidence that triggered the ALJ's duty to further develop the  
20 record regarding borderline personality disorder. Plaintiff also fails to acknowledge that at step  
21 two, the ALJ indicated that she "considered all of the claimant's symptoms regardless of the  
22 diagnostic label in [her decision]." AR at 23.

23 Instead, Plaintiff turns to argue that "it cannot be reasonably disputed" that his anxiety  
24 and social limitations are disabling, and that the ALJ erred in finding him not disabled. Dkt. 14

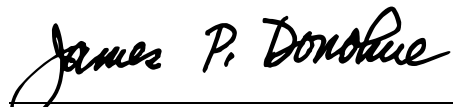


1 at 24. This argument appears to be misplaced, because it is untethered to any contention  
2 regarding the ALJ's duty to develop the record. Furthermore, with respect to the limitations  
3 that Plaintiff argues should have been found disabling, Plaintiff provides no argument  
4 regarding the ALJ's reasons for discounting those limitations, despite Plaintiff's own  
5 acknowledgement that this Court reviews the ALJ's decision rather than re-weighing the  
6 evidence. Dkt. 14 at 25 ("As is well-known, it is not the task of a reviewing court to reweigh  
7 the evidence or reanalyze the evidence in light of Agency policy, but rather to judge the ALJ's  
8 reasons for denying benefits on their own terms."). Thus, the Court will decline Plaintiff's  
9 invitation to reweigh the evidence regarding the limitations that were not included in the ALJ's  
10 RFC assessment, in the absence of any analysis of or specific challenge to the ALJ's reasons  
11 for doing so.

#### 12 VIII. CONCLUSION

13 For the foregoing reasons, the Court AFFIRMS the Commissioner's decision.

14 DATED this 30th day of November, 2017.

15 

16 JAMES P. DONOHUE  
17 Chief United States Magistrate Judge